The onus of proof in cargo claims: contract or bailment?

Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)[1]

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PART I

This article, which will be published over two issues, discusses the recent Supreme Court decision in *Volcafe Ltd* and the cases relied upon, which are compared with the pre- and post-Hague Rules cases that determined the liability of shipowners where goods were carried pursuant to contracts of carriage. Part I discusses the decisions of Wright J in *Gosse Millard* and Lord Esher in *The Glendarroch* and looks at the practice and procedure that has applied in the United Kingdom and elsewhere in the conduct of such cases since the mid-19th century, which supports a contractual rather than a bailment approach to the onus of proof in such transactions.

Lord Sumption, who retired from the Supreme Court (UK) shortly after delivering this judgment, seems to have heeded the siren call of the late Sir Guenter Treitel when he said: 'God said, let bailment be! And all was light!'[2]

In this recent decision of the United Kingdom Supreme Court, the Court has overruled the 1894 English Court of Appeal decision in *The Glendarroch*,[3] which the leading judgment of Flaux J in the English Court of Appeal in *Volcafe*[4] had described as containing the 'classic exposition of the burden of proof in cases of carriage of goods by sea at common law before the adoption of the Hague Rules'. *The Glendarroch* has been relied upon by many courts and judges of great repute in the UK, Australia and elsewhere as forming the foundation for the operation and interpretation of the Hague Rules.

[1] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* [2018] UKSC 61, [2019] 1 Lloyd's Rep 21, [2018] 3 WLR 2087.

[2] Francis Reynolds QC, referring to a lecture (a Clarendon lecture delivered at Oxford in October 2001) in F Reynolds QC 'Maritime and other influences on the common law' [2002] LMCLQ 182, 185. The author made the following percipient comments in the same paragraph, after referring to *The Pioneer Container KH Enterprise v Pioneer Container (The Pioneer Container)* [1994] 2 AC 324 and the *The Mahkutai* [1996] AC 650, [1996] 2 Lloyd's Rep 1 (PC), as providing 'new and advanced thinking in the deployment of bailment reasoning, reasoning which could be taken to be a "secret weapon" of the common law'. He said: 'With his or her back to the wall, the lawyer may think of slightly different results that may follow from implied contract reasoning or bailment reasoning – or, of course, tort reasoning – and seek to obtain those for his or her client'.

[3] *The Glendarroch* [1894] P 226 (CA).

[4] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [31].

Facts of the case

The essential facts in this case were that coffee beans were shipped from Colombia to Germany and suffered condensation damage. The amount claimed was US$62,500. The containers in which the coffee beans were carried were provided and stuffed with the bags of coffee by the carrier and, before stuffing, the bare corrugated steel of the containers was lined by the stevedores with Kraft paper. The carrier relied on the defence of inherent vice and exculpatory provisions in the bill of lading. The case pursued by the cargo interests was that the containers were inadequately prepared by the carrier to protect the cargo from condensation during the carriage and such preparation was part of the loading process.

In the Supreme Court, Lord Sumption wrote the only judgment with which the rest of the Court agreed and allowed the appeal, thus restoring the verdict of the first instance judge in favour of the cargo owner. The judgment commences by saying that: 'This appeal is about the burden of proof in actions against a shipowner for loss of or damage to cargo'.[5] Later, he explains that it arises at two stages: first, in relation to Article III rule 2 and, secondly, to Article IV rule 2(m).

He explained that the cargo owners:

> pleaded their case in what has for many years been standard form. Their primary case was that in breach of its duties as bailee the carrier failed to deliver the cargoes in the same good order and condition as that recorded on the bill of lading on shipment. Alternatively they pleaded that in breach of Article III rule 2 of the Hague Rules it had failed properly and carefully to load, handle, stow, carry, keep, care for and discharge the cargoes. A number of particulars of negligence was pleaded. For present purposes, the only relevant one is that the carrier failed to use adequate or sufficient Kraft paper to protect the cargoes from condensation. The carrier joined issue on all these points and pleaded inherent vice on the ground that the coffee beans were unable to withstand the ordinary levels of condensation forming in containers during passages from warm to cool climates. The cargo owners pleaded in reply that any inherent characteristic of the cargo which resulted in damage, did so only because of the carrier's negligent failure to take proper measures for its protection.[6]

Apart from that passage of the Supreme Court's judgment, there is very little assistance given in the judgments as to exactly how the case was pleaded but the first instance judge does refer to the plaintiff's case being advanced 'Primarily as one of *res ipsa loquitur*' (although followed by further or alternative positive allegations relating to the use and deployment of the Kraft paper.) In addition, the principal claimants are referred to as 'consignees under the bills of lading' and there is a sub-heading 'The contracts of carriage' and the following paragraph refers to 'Conditions' in the bill of lading, including a clause paramount incorporating the Hague Rules, which suggests that a contractual claim was also made. Relevant provisions are reproduced from both the bills of lading and the Hague Rules in the first instance judgment.[7]

The bailment approach

Early in the Supreme Court's judgment in *Volcafe*, Lord Sumption identified two fundamental principles of the common law of bailment. The first he described as being that a bailee is not an insurer, his duty being limited to taking reasonable care of the goods. The second he described as follows:

> although the obligation of the bailee is thus a qualified obligation to take reasonable care, at common law he bears the legal burden of proving the absence of negligence. He need not show exactly how the injury occurred, but he must show either that he took reasonable care of the goods or that any want of reasonable care did not cause the loss or damage sustained'.[8]

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[5] ibid [1].

[6] ibid [4].

[7] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* [2015] EWHC 516 (Comm); [2015] 1 Lloyd's Rep 639 [12], [13], [14]; [2016] 1 All ER (Comm) 657.

[8] *Volcafe Ltd v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [8] and [9].

The three cases relied on by the Supreme Court as establishing that such a burden applies for carriage by water included two unreported decisions of the House of Lords in *Dollar v Greenfield*,[9] *Morison Pollexfen and Blair v Walton*[10] and *Joseph Travers & Sons Limited v Cooper*.[11] The latter case refers to the two earlier cases. The first instance judge in *Joseph Travers*[12] was Pickford J (later Baron Sterndale), who became President of the Probate Divorce and Admiralty Division, a Court of Appeal judge (Master of the Rolls)[13] and the chair of the Committee of the Joint Houses of Commons and Lords on the Hague Rules (the Joint Committee).[14]

The *Joseph Travers* case[15] preceded the Hague Rules and the events in question took place in 1913. The issue was whether a wharfinger and a warehouseman were liable for loss of or damage to 5,518 cases of tinned salmon while they were on the wharfinger's barge. The terms and conditions for any lighterage which the wharfinger performed read: 'I will not be responsible for any damage to goods however caused which can be covered by insurance. Merchants are advised to see that their policies cover risks of craft and are made without recourse to lighterman'.

In the Court of Appeal in *Joseph Travers*,[16] Buckley LJ accepted that the lighterman had the onus of proof, having undertaken 'the liability of a common carrier'. Kennedy LJ did not find it necessary to determine whether the lighterman was a common carrier but found that the lighterman did have a duty not to be negligent and he was negligent, but then concluded his decision by saying that he disagreed with Pickford J as to the burden of proof; however, he found in favour of the defendant on the exclusion clause. Phillimore LJ also differed from Pickford J on the burden of proof. He said:

> I think that when the bailee of goods has to admit that the goods have been damaged while in his custody and in the absence of the custodian, and it is found that the absence was improper and negligent and that that very absence makes it difficult to determine what was the cause of the damage and the owner can suggest a probable cause which the presence of the custodian might have prevented, the burden is upon the bailee to show that it was not the negligent absence which was the cause of the damage.[17]

He then quoted with approval what Lord Loreburn had said in *Morison, Pollexfen and Blair v Walton*.[18] He also decided the case in favour of the defendant on the basis of the exclusion clause. In none of the Court of Appeal judgments is there any mention of *The Glendarroch* or the cases referred to by the defendant's counsel. Nor was it necessary for the bailee to negative negligence before it could rely on the exclusion clause. None of those cases is controversial; indeed, it is likely that *Joseph Travers*[19] would be decided in the same way today and the other two decisions, from what we know of them, being straightforward bailment cases, that would seem to apply to them as well. Of those three cases relied upon by the Supreme Court, only the *Joseph Travers*[20] case involved a very basic contractual exclusion clause and none of the cases involved a contract of sea carriage and a bill of lading but, most importantly, the bailee despite not having negatived negligence was entitled to rely on the exception clause. The Supreme Court decision in commenting on this decision makes no mention of this aspect of the case.

Reliance was also placed by Lord Sumption on *The Ruapehu*,[21] where Lord Sumption says Atkin LJ 'assimilated the law applied to carriers in these cases to the principles applicable to bailees

[9] *Dollar v Greenfield* (unreported) *The Times* (18 May 1905).
[10] *Morison Pollexfen and Blair v Walton* (unreported) (10 May 1909).
[11] *Joseph Travers & Sons Limited v Cooper* [1915] 1 KB 73 (CA).
[12] ibid.
[13] From 1912 to 1923.
[14] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill together with the Proceedings of the Committee Minutes of Evidence and Appendices' (London 1923).
[15] *Joseph Travers & Sons Limited v Cooper* (n 11).
[16] ibid.
[17] ibid 97.
[18] *Morison Pollexfen and Blair v Walton* (n 10).
[19] *Joseph Travers & Sons Limited v Cooper* (n 11).
[20] ibid.
[21] *Owners of the SS Ruapehu v R & H Green and Silley Weir Limited (The Ruapehu)* (1925) 21 Ll L Rep 310, 315.

generally'.[22] *The Ruapehu*[23] involved a shipowner's claim against a repairer for damage occasioned when a fire occurred on board the vessel while in dry dock. Like the other three cases, *The Ruapehu*[24] has, with respect, nothing to say about carriage of goods cases involving a bill of lading, let alone the Hague Rules. Two of the Court of Appeal judges and the first instance judge decided it on the basis of the first cause of action that the plaintiff relied on, negligence, and not its later amended cause of action in bailment. Atkin LJ commenced his judgment by saying: 'I have found this a very difficult case. I have had considerable doubt as to the right decision, doubt which has not been entirely removed'.[25] Later, apparently recognising the shifting burden of proof that occurs in such cases, he said:

> The bailee has to show that the loss was not occasioned by the absence of reasonable care and skill. This he may do by showing that he took all reasonable precautions but, if he has to admit or is convicted of some act of negligence then the rule necessarily requires him to show that the loss was not caused by that act of negligence.[26]

It is interesting to compare what Lord Atkin said in the *Stag Line* case[27] a few years later in the House of Lords, when he said:

> The position in law seems to be that the plaintiffs are prima facie entitled to say that the goods were not carried safely; the defendants are then prima facie entitled to rely on the exception of loss by perils of the sea; and the plaintiffs are prima facie entitled in reply to rely upon a deviation … I am satisfied that the general principles of English law are still applicable to the carriage of goods by sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of 'the contract of carriage of goods by sea' to which the Act applies.[28]

Gosse Millard Limited v Canadian Government Merchant Marine Limited[29]

Lord Sumption singles out Scrutton LJ and Lords Wright and Hobhouse as being 'notable authorities in this area of the law'[30] and, therefore, it is necessary to look closely at what each of them has said in this context. At the heart of the Supreme Court's decision in *Volcafe* is what was said by Wright J in *Gosse Millard*, which was a contract of sea carriage case involving a bill of lading for the shipment of 20,000 boxes of tin plates from Swansea to Vancouver. The voyage was delayed when the vessel was damaged at an intermediate port, Liverpool, and the cargo eventually arrived rusty, stained and depreciated. The plaintiff sued for alleged breach of duty and/or contract, and asserted a failure properly and carefully to load, stow, carry, keep, care for and discharge. The defendant denied those allegations and negligence and relied on Article IV rule 2(a), (c), (d), (i) and (q). Wright J found that the cause of damage was due to wetting received during the vessel's stay at Liverpool, which was not consistent with its duties under Article IV rule 2 or, alternatively, the precise cause of the damage could not be explained, making it necessary for him to determine on whom the onus of proof lay under the Carriage of Goods by Sea Act 1924. The reported first instance judgment of Wright J is a truncated version of what he dealt with as it does not include 'the facts and his findings' in the two claims that were tried together. The first instance judgment that is reported therefore only comprises four and a half pages. The case is perhaps better known for its interpretation of what amounts to 'management of the ship' in the context of the Hague Rules exception in Article IV rule 2(a), with which the Court of Appeal and House of Lords were more interested later. Wright J commenced his judgment by referring to the Carriage of Goods by Sea Act 1924 as having 'radically changed the

[22] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [9].
[23] *The Ruapehu* (n 21).
[24] ibid.
[25] ibid 314.
[26] ibid 315.
[27] *Stag Line Ltd v Foscolo, Mango and Company* [1932] AC 328.
[28] *The Ruapehu* (n 21) 340.
[29] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* [1927] 2 KB 432.
[30] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [24].

legal status of sea carriers under bills of lading',[31] but makes no reference to how that came about; nor is any mention made of *The Glendarroch*, but it does refer to the cases, also relied upon by Lord Sumption, which are bailment cases, not involving bills of lading to which reference has already been made.[32]

Wright J's reasoning process started with the following:

> The words 'properly discharge' in Article III rule 2 mean, I think, 'deliver from the ship's tackle in the same good order and condition as on shipment', unless the carrier can excuse himself under Article IV. Hence the carrier's failure so to deliver must constitute a prima facie breach of his obligations, casting on him the onus to excuse that breach. That this is so, I think, is confirmed by the language of Article IV rule 1 which deals with unseaworthiness and provides that in a case of loss or damage resulting from unseaworthiness, the carrier must prove the exercise of due diligence to make the ship seaworthy.[33]

Wright J then decided that the use of the words 'the person claiming the benefit of this exception' in rule 2(q) meant that, by implication, the same onus applied to each of the other exceptions. (Flaux J in the Court of Appeal in *Volcafe*[34] found the inclusion of those words to indicate the opposite for the remaining provisions in Article IV.) Wright J then said:

> I do not think that the terms of Article III put the preliminary onus on the owner of the goods to give affirmative evidence that the carrier has been negligent. It is enough if the owner of the goods proves either that the goods have not been delivered, or have been delivered damaged. The carrier is a bailee and it is for him to show that he has taken reasonable care of the goods while they have been in his custody (which includes the custody of his servants or agents on his behalf) and to bring himself, if there be loss or damage, within the specified immunity. It is, I think, the general rule applicable in English law to the position of bailees that the bailee is bound to restore the subject of the bailment in the same condition in that in which he received it, and it is for him to explain or offer a valid excuse if he has not done so. It is for him to prove that reasonable care had been exercised.[35]

Wright J also relied on a decision of Lord Sumner's in the *Bradley & Sons*[36] case and it is interesting to compare what Lord Summer had said in that case compared with what he said in *Owners of Steamship Matheos* and *Louis Dreyfus*[37] two years earlier in the House of Lords. This was a charterparty claim for demurrage involving the applicability of an exception clause and Lord Sumner (with whom Lord Buckmaster agreed) said:

> It has been decided that, when a prima facie case of excepted perils is met by an allegation of negligence: the *Glendarroch*, or unseaworthiness: the *Northumbria*[38] the burden of proof shifts to the party interested in establishing this allegation affirmatively …[39]

The Glendarroch was not mentioned in the judgments in *Bradley & Sons*.[40] Lord Sumner's comments in *Bradley & Sons*[41] on which Wright J had relied can be seen, in the light of *The Matheos* case[42] as overstating the onus which was on the carrier, especially when, as in that case, the plaintiffs called considerable evidence in support of its unseaworthiness and lack of care arguments.

Towards the end of his judgment on this issue in *Gosse Millard*, Wright J said:

> On the above grounds, if the true conclusion be that the cause of the damage to the tin plates has not been ascertained but is left in doubt, I think that the defendants have not discharged the onus which is

[31] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* (n 29) 434.
[32] *Dollar v Greenfield* (n 9); *Morison Pollexfen and Blair v Walton* (n 10); *Joseph Travers & Sons Limited v Cooper* (n 11); *The Ruapehu* (n 21).
[33] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* (n 29) 434 and 435.
[34] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (2017) 1 Lloyd's Rep 32 at [50].
[35] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* (n 29) 435.
[36] *Bradley & Sons v Federal Steam Navigation Co Ltd* [1927] 27 Ll L Rep 395.
[37] *Owners of Steamship Matheos v Louis Dreyfus & Co* [1925] AC 654 (HL).
[38] *The Northumbria* [1906] P 292.
[39] *Owners of Steamship Matheos v Louis Dreyfus & Co* (n 37) 666.
[40] *Bradley & Sons v Federal Steam Navigation Co Ltd* (n 36).
[41] ibid.
[42] *Owners of Steamship Matheos v Louis Dreyfus & Co* (n 37).

> on them to negative negligence on the part of their servants and to prove some excepted peril, and hence they must be held liable.[43]

In a very short concluding paragraph, Wright J dealt with the case by rejecting the carrier's Article IV rule 2(a) defence which, as mentioned earlier, was the issue that the case has also become particularly well known for, in the light of the Court of Appeal and House of Lords judgments, interpreting the bounds of the shipowners' exclusion in 'navigation and management'. The Court of Appeal's expansive interpretation of what amounted to management of the ship (from which Greer LJ dissented), was overturned in the House of Lords[44] and Lord Sumner again had some interesting things to say about the Hague Rules:

> I concur in the judgment of Greer LJ The intention of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to replace a conventional contract, in which it was constantly attempted, often with much success, to relieve the carrier from every kind of liability, by a legislative bargain, under which he would be permitted to limit his obligation to take good care of the cargo by an exception, among others, relating to navigation and management of the ship …
>
> When the legislature gave effect in 1924 to the labours of the International Conferences on Maritime Law in 1922 and 1923, it must be taken to have been aware of the English decisions which from '*The Ferro*'[45] in 1893 onwards had construed the words reproduced in Article IV rule 2, and as that line of decision had covered some thirty years and the clause had remained in general use in bills of lading I think it must be taken that the Legislature intended to confirm the construction thus judicially arrived at, except in so far as, by introducing variations in the language used, it clearly made a change.[46]

Later in his judgment, Lord Sumner emphasised this point in saying:

> In adopting this view of the words of the Act and of their correspondence with the construction put upon the old bill of lading clause from *The Ferro*[47] to *Rowson v Atlantic Transport Co*.[48] I am fortified by the weighty judgments of the Court of Appeal in *Hourani v Harrison*[49] and by a series of decisions in the High Court. I think it is of importance to notice how uniformly since 1893 the English courts have interpreted the decisions down to and including *Rowson*'s case in the sense I have ventured to suggest and how generally a similar interpretation of similar words has been adopted in the United States.[50]

A case which is not referred to in the *Volcafe* decision is *Elder Dempster and Company Ltd v Paterson, Zochonis & Company Ltd*, where Lord Sumner held that: 'There was, finally, an argument that the shipowners might be liable in tort, or at any rate, as bailees *quasi ex contractu*, though the charterers and their agents were not. This fails, to my mind'.[51]

He then discussed the authority relied upon by the respondents, that he did not find helpful, and said:

> It may be, that in the circumstances of this case the obligations to be inferred from the reception of the cargo for carriage to the United Kingdom amount to a bailment upon terms, which include the exceptions and limitations of liability stipulated in the known and contemplated form of bill of lading. It may be, that the vessel being placed in the Elder, Dempster & Co's line, the captain signs the bills of lading and takes possession of the cargo only as agent for the charterers, though the time charter recognises the ship's possessory lien for hire. The former I regard as the preferable view, but, be this as it may, I cannot find here any such bald bailment with unrestricted liability, or such tortious handling entirely independent of contract, as would be necessary to support the contention.[52]

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[43] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* (n 29) 437.

[44] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* [1929] AC 223 (HL).

[45] *The Ferro* [1893] P 38. *The Ferro* was a cargo claim in relation to oranges and the carrier had sought to rely on an exception in the bill of lading relating to 'management of the ship'.

[46] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* (n 44) 236 and 237.

[47] *The Ferro* (n 45).

[48] *Rowson v Atlantic Transport Co* [1903] 1 KB 114, [1903] 2 KB 666.

[49] *Hourani v Harrison* (1927) 32 Com Cas 305 (CA).

[50] *Gosse Millard Ltd v Canadian Government Merchant Marine Ltd* (n 44) 238.

[51] *Elder Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522, 564 (HL).

[52] ibid 564.

Lord Sumner, in referring to a 'bald bailment', was presumably referring to the situation described by Holt CJ in *Coggs v Bernard*,[53] in which goods are delivered by one person to another to keep for the use of the bailor, or *depositum*.

Lord Denning, in dissenting in the House of Lords in *Midland Silicones Ltd v Scruttons Limited*[54] echoed similar sentiments to those of Scrutton LJ in *Elder Dempster*,[55] in warning his brethren in the House of Lords against permitting goods owners to circumvent the Hague Rules by suing a stevedore (or even a master, or other employee of the shipowner), which they were able to do since the independent tort of negligence had been confirmed in 1932.[56] Shortly after referring to Lord Sumner's judgment in *Elder Dempster*, in which he dealt with an argument that the shipowners might be liable in tort, or at least as bailees *quasi ex contractu*,[57] Lord Denning said:

> If the draftsmen of the Hague Rules had thought in those days that the goods owner could get around the exceptions by suing the stevedores or the master in tort, they would surely have inserted provisions in those Rules to protect them. They did not do so because they did not envisage their being liable at all.[58]

In *Volcafe*, Lord Sumption then referred to Lord Justice Scrutton's leading judgment in the Court of Appeal in *Silver v Ocean Steamship Co Ltd*,[59] where he had held, in the words of Lord Sumption, 'as Wright J had done' (in *Gosse Millard*) that: 'the Hague Rules had made no difference to the incidence of the burden of proof in cases of bailment for carriage'.[60]

It is important to look closely at what Scrutton LJ said, particularly bearing in mind some later remarks by Wright J in *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd*.[61] In *Silver*'s[62] case, which involved a cargo of Chinese eggs shipped to London, the principal issue was the effect of the acknowledgement in the bill of lading as to the apparent good order and condition of the cargo on receipt by the carrier and the insufficiency of packaging exclusion. Scrutton LJ said as follows in *Silver*'s case:[63]

> Two questions seem to arise at this stage. First, under the law prior to the Carriage of Goods by Sea Act 1924 a shipowner who received goods which he signed for 'in apparent good order and condition' to be delivered in the like good order and condition, and who delivered them not in apparent good order and condition, had the burden of proving exceptions which protected him for the damage found. The present bill of lading runs 'shipped in apparent good order and condition for delivery subject to Conditions' etc. Has any difference been made in the old law by this wording? In my opinion no difference has been made. I agree with the view expressed by Wright J in *Gosse Millard*[64] on similar words, that there is still an obligation to deliver in the like apparent good order and condition unless the ship owner proves facts bringing him within an exception covering him. Lord Sumner in *Bradley & Sons v Federal Steam Navigation Co*[65] appears to express the same view.[66]

Scrutton LJ does not seem to have differed from anything that Lord Esher said in *The Glendarroch* and does not seem to be going as far as Wright J had done. He is merely addressing the initial burden which the carrier bears to bring itself within an exception in the bill of lading. Unfortunately, the last edition of his book on *Charterparties and Bills of Lading* that he edited with F D Mackinnon was the

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[53] *Coggs v Bernard* (1703) 2 Ld Raym 909; 92 ER 107.
[54] *Midland Silicones Ltd v Scruttons Limited* [1961] 2 Lloyd's Rep 365 (HL(E)), [1962] AC 446.
[55] *Paterson Zochonis and Company Limited v Elder Dempster and Company Limited* [1923] KBD 420, 441 and 442.
[56] *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562.
[57] See text to n 51.
[58] *Midland Silicones Ltd v Scruttons Limited* (n 54) 382.
[59] *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, 424–25 (CA).
[60] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [22].
[61] *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154.
[62] *Silver v Ocean Steamship Co Ltd* (n 59).
[63] ibid.
[64] *Gosse Millard Ltd v Canadian Government Merchant Marine Limited* (n 29).
[65] *Bradley & Sons v Federal Steam Navigation Co Ltd* (n 36).
[66] *Silver v Ocean Steamship Co Ltd* (n 59) 424.

11th, published in 1923, so does not contain any material on the Carriage of Goods Bill, which was before the Parliament at that time. The following passages are significant however: in Article 52 'Shipped in Good Condition – Weight, Value and Contents unknown – Quality and Quantity unknown' the text does say: 'If such goods are delivered damaged the shipper must give prima facie evidence either that they were shipped in good condition or that the damage resulted from some cause for which the shipowner is liable', and in Article 91: 'Operation of Exceptions' it says:

> The arrival of the ship, coupled with failure to deliver the goods is prima facie evidence of breach of contract, and, probably of negligence, by the shipowner. The shipowner must shew that the cause of the loss was one of the excepted perils in the bill of lading, or that the goods were not shipped, in order to free himself. If he makes a prima facie case to this effect, the shipper must then disprove it by shewing that the real cause of the loss was something not covered by the exceptions, as, for instance, the negligence of the shipowner or his servants, where negligence is not one of the excepted perils, or unseaworthiness where unseaworthiness is not excepted, or that there has been a deviation; and unless he can prove one of these, the shipowner will be protected.

It is also relevant that in his detailed evidence to the Joint Committee in 1923,[67] in which he was extremely critical of the Hague Rules, Scrutton LJ made no mention of them having 'radically changed the legal status of sea carriers' as Wright J suggested, and confined his comments in large part to matters of drafting. Had he thought that the Rules made a radical change to the detriment of sea carriers he would surely have drawn it to the Committee's attention.

Another judge of high repute who delivered a judgment in *Silver*'s case[68] was Greer LJ, who said:

> But the exception of insufficient packing which was incorporated in the bill of lading by reference to the Rules contained in the Carriage of Goods by Sea Act, 1924, will not protect the defendants if negligence is proved. Even if the liability of the shipowner be that of a common carrier, and it is proved that the damage is within the exceptions in the contract of carriage, the owner of the goods can still recover notwithstanding the exceptions *if he shows* that the damage was caused by the negligence of those for whom the shipowner is responsible. *The plaintiff failed to prove any negligence in loading* or in the carriage to London, but he did prove negligence in the discharge. *The plaintiff had to prove* not merely negligence; he had to prove the amount of the damage he suffered due to that negligence.' (Emphasis added.)[69]

How exception clauses in bills of lading have been applied in the UK since at least the 1850s

The Glendarroch

Lord Sumption in *Volcafe* identified the 'sheet anchor of the carrier's case' on the appeal being the English Court of Appeal's decision in *The Glendarroch*, which was decided before the Hague Rules, but in which a contractual defence of perils of the sea was relied upon by the carrier. The facts in *The Glendarroch* were that the vessel had run aground and the cargo claimant sued for non-delivery of its goods. At first instance, in the course of argument Sir Francis Jeune had ruled that, in order to excuse itself for the damage to the goods, the carrier bore the onus of proof to show not only a peril of the sea but a peril of the sea not occasioned by its negligence had occurred. Counsel for the carrier then declined to call any evidence and judgment was given in favour of the cargo interests. The subsequent appeal was allowed and a new trial ordered. It was held that the burden of proof was on the cargo interests to show that the excepted peril had been occasioned by the carrier's negligence.

The Court of Appeal in *The Glendarroch* comprised Lord Esher MR and Lopes and Davey LJJ. It is apparent from the cases relied upon in *The Glendarroch* that nothing much has changed in the last 178 years (until now) in the pleading and conduct of cargo litigation. Counsel for the carrier referred

[67] House of Commons 'Report from the Joint Committee on the Carriage of Goods by Sea Bill' (n 14).
[68] *Silver v Ocean Steamship Co Ltd* (n 59).
[69] ibid 435.

the Court of Appeal in *The Glendarroch* to the case of *Wyld v Pickford*, an 1841 decision,[70] in which goods had been consigned for shipment from London to Athlone in Ireland and the goods were lost. The Court found that there was a special contract entered into by reason of the carrier giving a notice to the goods owner that he would only carry the goods at a certain fee, being calculated according to their value, and if not accepted he would carry on his own terms. The carrier was thereby bound to take ordinary care and could be liable for wilful negligence or conversion. Parke B in his judgment explained the nature of the usual pleadings:

> In an action on the case for breach of a duty arising *ex contractu*, upon a bailment, or otherwise, it is not necessary to state the contract with the same forms as in an action of assumpsit. The usual mode is to aver, as is done here, that the goods were delivered by the plaintiff to the defendant, and had been received by the defendant, to be kept, or carried, or dealt with in a particular way. In this plea there is an averment, after the allegation of the notice, and knowledge thereof by the plaintiff at the time of delivery of the goods to the defendants that they accepted and received the goods from the plaintiff to be carried and conveyed, subject and under and upon the terms and conditions of the notice, and upon no other terms, whereupon the plaintiff then had knowledge and notice. It is objected that there is no express averment that the plaintiff consented to those terms; but assuming that he did not, the defendant did not accept the goods on any other, and the plaintiff is in this difficulty, that he cannot enforce the defendants' obligation as common carriers, with all the obligations of that character, because he was not ready to pay the price of carriage beforehand, and if he sue as on a bailment to the defendants on special terms, it must be a bailment on these terms on which alone the defendants have agreed to accept the goods.[71]

Parke B then noted an objection that had been made:

> A third objection was, that the plea ought to have gone on to allege, that the loss was not occasioned by such negligence as the defendants were responsible for, notwithstanding the terms on which they accepted the goods. We think that the proper answer to this objection was given, viz., that such negligence should have been replied or more properly speaking, newly assigned.[72]

Later in the judgment, Parke B said that the better view on the authorities is that all that is necessary in order to render a carrier liable after giving such a notice is proof of ordinary negligence by a carrier and 'after such a notice, it may be that the burthen of proof of damage or loss by the want of such care would lie on the plaintiff'.[73]

Lord Esher in *The Glendarroch* made specific reference to four other cases that counsel had referred to which he described as being 'distinct on this point', namely 'the course of pleading did give the right view of the different shiftings of the burden of proof'.[74] The cases he referred to were *Grill v General Iron Screw Collier Co*,[75] *Czech v General Steam Navigation Co*[76] and two Scottish cases *Craig v Delargy*[77] and *Dobbie v Williams*.[78] (Other cases that were cited were *The Helene*,[79] *The Norway*[80] and *Phillips v Clark*.[81])

The *Czech*[82] case is illustrative. The report of the appeal decision sets out the 'Declaration' by the plaintiff which essentially asserted the ownership by the defendant of a steam ship, the shipment of several bales of cotton goods by the plaintiff from Hamburg to London under a bill of lading which

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[70] *Wyld v Pickford* (1841) 8 M & W 443, 151 ER 1113.
[71] ibid 457.
[72] ibid 458.
[73] ibid 460.
[74] *The Glendarroch* (n 3) 232.
[75] *Grill v General Iron Screw Collier Co* (1866) LR 1 CP 600, (1868) LR 3 CP 476.
[76] *Czech v General Steam Navigation Co* (1867) LR 3 CP 14.
[77] *Craig v Delargy* (1879) 16 Scotch LR 750.
[78] *Dobbie v Williams* (1884) 21 Scotch LR 667.
[79] *The Helene* (1866) Br & Lush 429, 167 ER 434.
[80] *The Norway* (1865) 3 Moo PC (NS) 245, 16 ER 92. Mr Brett QC had appeared for the appellant shipowner.
[81] *Phillips v Clark* (1857) 2 CB (NS) 156, 140 ER 372.
[82] *Czech v General Steam Navigation Co* (n 76).

were in good order and condition, the receipt of the goods by the defendant and its negligence, not by any excepted perils, causing the failure to deliver them in the like good order and condition. There then follows the pleas of the defendant, essentially denial and reliance on a general exception clause: 'The act of God, molestation of war, fire, machinery, boilers, steam, and every other dangers and accidents of the seas, rivers, and steam navigation of whatsoever nature and kind excepted; weight and contents unknown; the said goods to be free of breakage, leakage and damage'. The headnote stated:

> *Held* that the exception did not protect the shipowners from liability for damage accruing through the negligence of their servants, but that it did shift the onus of proof, and that it was incumbent upon the plaintiffs to prove affirmatively the negligence of the defendants' servants, also that the above facts were evidence upon which a jury were justified in the existence of negligence.

The headnote in the Scottish case of *Dobbie*[83] is also instructive:

> *Held* (1) that the onus lying on the shipowner to show that the damage did not result from his fault was shifted by the proof of the stormy weather the vessel encountered; (2) that having regard to the nature of the weather experienced on the voyage it lay on the owner of the cargo to establish that the dunnage was insufficient, and this not having been done, that the shipowner was not liable for the damage sued for.

The cargo owner pleaded that the cause of the damage to the cement cargo was contact with sea water, overloading, weakness in the coamings of the main hatch and a want of sufficient dunnage. Lord Shand held:

> In the ordinary case, when the shipowner has bound himself to deliver the goods carried by him in the like good order in which they were shipped, if he fails to do so, it falls upon the shipmaster to account for any damage which the cargo may have sustained; but if the log book shows that in the course of the voyage the vessel encountered weather of exceptional severity, then I think the shipmaster sufficiently discharges the *onus* which lies upon him by showing that the damage has arisen from a cause beyond his control. This shifts the *onus*, and I think in the present case the shipmaster has sufficiently discharged the *onus* by showing the excessive length of the voyage and by proving the exceptional severity of the weather which this vessel encountered on her voyage to Dumfries. In regard to the matter of dunnage, I think it falls upon the owner of the cargo to prove that the dunnage supplied was insufficient.[84]

Such cases provide excellent examples of how cargo litigation was conducted in the second half of the 19th century.

It is now necessary to consider in detail what Lord Esher MR said in his judgment in *The Glendarroch*.[85] He commenced his judgment by saying:

> We have to treat this case as if the contract were in the ordinary terms of a bill of lading. The contract being one on the ordinary terms of a bill of lading, the goods are shipped on the terms that the defendant undertakes to deliver them at the end of the voyage unless the loss of the goods during the voyage comes within one of the exceptions in the bill of lading.
>
> The exception relied upon by the defendants is that the goods were lost or damaged by a peril of the sea; and upon that, it is alleged that, even though that be true, yet that peril of the sea was the result of negligent navigation on the part of the defendants' servants.
>
> The law is that if that be made out the defendants have no defence, and the plaintiffs are entitled to succeed, and the real question is, how is that to be made out? By which of the parties is it to be made out?
>
> It is to be decided according to the practice of the law courts; and the question is, how is that result to be arrived at? The terms of the bill of lading as they stand on paper are, except the loss be from perils

[83] *Dobbie v Williams* (n 78) 668.
[84] ibid 670.
[85] *The Glendarroch* (n 3) 229–32.

> of the sea. But then it is said that, nevertheless, if the perils of the sea are produced by the negligence of the defendants' servants, then that loss cannot be relied on by the defendants. How can that be unless there be an irresistible inference that such exception does exist in the contract though it is not written in it, so that the exception must be read into it as if it were in it. Therefore we must try and see whether this stipulation as to negligence must be written in or be considered as written in.
>
> The liabilities of shipowners under a bill of lading are in that part which precedes the exceptions. Is this stipulation about the loss being the result of the negligence of the shipowners' servants – although within the terms of the exceptions – is that to be written in before the exceptions or not? The first thing that strikes one is that in that part of the contract it is not wanted. It is immaterial.
>
> Before you come to the exceptions the liability of the ship owner is absolute. He has contracted that he will deliver the goods at the end of the voyage. If there were no exceptions, it would be utterly immaterial whether the loss was caused by his servants or not. Even if there were no exceptions whatever he would be liable. It cannot be, therefore, that this irresistible inference ought to be written into that part of the contract. It is not wanted there; therefore you must write it into that part which contains the exceptions.
>
> When you come to the exceptions, among others, there is that one, perils of the sea. There are no words which say 'perils of the sea not caused by the negligence of the captain or crew'. You have got to read those words in by a necessary inference. How can you read them in? They can only be read in, in my opinion, as an exception upon the exception. You must read in, 'Except the loss is by perils of the sea, unless or except that loss is the result of the negligence of the servants of the owner'.
>
> That being so, I think that according to the ordinary course of practice each party would have to prove the part of the matter which lies upon him. The plaintiffs would have to prove the contract and the non-delivery. If they leave that in doubt, of course they fail. The defendants' answer is, 'yes; but the case was brought within the exception – within its ordinary meaning'. That lies upon them. Then the plaintiffs have a right to say there are exceptional circumstances, namely that the damage was brought about by the negligence of the defendants' servants, and it seems to me that it is for the plaintiffs to make out that second exception.
>
> In my opinion, you find in all the books, down to the most modern times, that the pleading followed that view of the burden of proof. The declaration stated the bill of lading, and, relying on the first and substantive part of the bill of lading, allege non-delivery. Strictly speaking, the declaration could not properly have stated anything about negligence, because negligence was immaterial.
>
> *The plea followed the terms of the exception construed in their ordinary sense – that is the loss was a loss by perils of the sea. No plea that can be found in the books ever went on to say that the loss by perils of the sea was not caused by negligence. Yet, if the contention be true that the burden of proof to that extent lies on the defendant, every one of those pleas without that allegation was no answer to the declaration, and was open to demurrer. There is no such case in which a demurrer was brought forward and supported. As that was so, it shows there was no part of the proof which the defendant was bound to give*. (Emphasis added.)

Lord Esher then considered the judgment of Lord Herschell in the case of *The Xantho*,[86] in which Lord Herschell had said:

> If the goods are not carried with reasonable care, and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the ship owner, he is liable for this breach of his covenant.[87]

Lord Herschell did not choose to determine in the House of Lords who bore the onus of establishing the negligence but, as Lord Esher said in the Court of Appeal seven years later in *The Glendarroch*:[88]

> I need hardly say that I have the greatest respect and regard for the legal opinion of Lord Herschell in any mercantile case; but reading what he said in *'The Xantho'* I think he positively declined to give an

[86] *Thomas Wilson Sons & Co v Owners of the Cargo of the Xantho (The Xantho)* (1887) 12 App Cas 503 (HL).
[87] ibid 510, 511.
[88] *The Glendarroch* (n 3) 233.

> opinion. It is said that looking through or into his words, the tendency of his mind may be seen; but that is not an opinion. The tendency of his mind when he refuses to give an opinion is not in my judgment an opinion at all. I therefore do not feel hampered by a supposed view of Lord Herschell, which I feel, if the case ever goes before him for decision, and if he had that idea passing through his mind, he will not act upon.

Lopes LJ in the Court of Appeal in *The Glendarroch* referred to Lord Herschell as not having decided the issue of onus and said: '[T]herefore, to put an extra-judicial dictum of that kind *against a practice which has existed for a great number of years* would be most undesirable and would be contrary to all precedent'. (Emphasis added.)[89]

Davey LJ likewise observed that:

> Counsel for the defendants have shown that under the old form of pleading before the Judicature Acts negligence must either be alleged in the declaration or else be specially replied. It may be doubted whether it would require to be set out in the declaration; but in either case it was a matter which must be alleged and proved by the plaintiffs. The *forms of pleading were not a mere technicality but were framed in the manner in which they were so as to carry out what is really a matter of substance*; and as the Master of the Rolls has explained, *the burden of proof followed and shifted from time to time, according to matters alleged in the pleading*. (Emphasis added.)[90]

Notara v Henderson,[91] *Thomas Wilson Sons & Co v The Owners of the Cargo of the Xantho (The Xantho)*[92] and *Hamilton, Fraser & Co v Pandorf & Co*[93]

The Supreme Court judgment in *Volcafe* found support from these cases decided in the late 19th century. Those cases were relied upon in the Supreme Court as being cases in which bill of lading exceptions for 'dangers and accidents of the seas' excused the carrier 'only if the relevant danger or accident happened without his fault'.[94]

Those cases, it is suggested, were litigated and tried in reliance on contractual principles as the pleadings dictated and do not support a bailment approach to the burden of proof. With respect to their Lordships in *Volcafe*, those cases, all of which preceded the Hague Rules, to the extent that they deal with negligence or burden of proof, are consistent with the decision in *The Glendarroch*. The House of Lords in *Volcafe*, in relying on those cases overlooks the fact that they are all predicated on the carrier having the burden of establishing the exclusion in the contract to protect it, but reliance on that exclusion could be defeated by the plaintiff if it established that the carrier had been negligent. It was not expressed to be necessary in any of those cases for the carrier to disprove negligence or to establish that it had taken reasonable care of the cargo. It simply had to bring itself within the exception and then the cargo owner could seek to establish that the exception did not apply because there had been negligence. In *The Xantho*, the issue came down to the question of whether there was a peril of the sea (and therefore the carrier was exempt) in the circumstances of a collision.

Practice and procedure

One has to speculate what Lord Sumption was intending in *Volcafe* when he said that the cargo owners had 'pleaded their case in what has for many years been standard form'.[95] My expectation, after practising in this area of the law for over 40 years, is that it would have followed the traditional approach whereby cargo owners sue sea carriers when their goods are lost or damaged relying on three causes of action: contract, tort and bailment. It is of note that in the 1973 (when this writer

[89] ibid 236.
[90] ibid 237.
[91] *Notara v Henderson* (1872) LR 7 QB 225.
[92] *The Xantho* (n 86).
[93] *Pandorf & Co v Hamilton, Fraser & Co* (1885) 16 QBD 629 (QBD).
[94] *Volcafe Ltd and Others v Cia Sud Americana de Vapores SA (trading as CSAV)* (n 1) [30].
[95] ibid [4].

qualified) edition of the British Shipping Laws – *Forms and Precedents* by Colinvaux, Steel and Ricks,[96] the precedent entitled 'Statement of Claim for Damage to Cargo During Voyage' pleads the description of the cargo contained in the bill of lading, its shipment on board in good order and condition for delivery in the same good order and condition, and in paragraph 3 says: 'In breach of their duty as carriers, and/or as bailees for reward, and/or in breach of the contract contained in or evidenced by, the said the bill of lading the defendants failed to deliver the cargo in the said good order and condition …'.

By the next paragraph, the relevant provisions of Article III rule 1 and rule 2 are to be set out. By the next paragraph after that, allegations are made that the carrier failed to exercise due diligence to make the vessel seaworthy and certain of the other duties set out in Article III rules 1 and 2 with particularisation of the allegations of unseaworthiness.

It is invariably the practice for cargo owners in this (Australian) jurisdiction to plead breaches of the carriers' responsibilities under Article III and to particularise the respects in which it is asserted that they did not meet those standards. If the particulars are inadequate or insufficient, the carrier will frequently seek further and better particulars by way of correspondence from the plaintiff as to those matters. The plaintiff may decline to respond until after provision of discovery and answers to interrogatories. The precedent in British Shipping Laws for a defence contains a denial of the breaches of contract, tort and bailment, and similarly the unseaworthiness allegation and pleads various exceptions under Article IV. The precedents in the more recent text of Steel and Parsons' *Admiralty and Commercial Court Forms*[97] follow the same format.

As the 19th century cases referred to show, the calling of the evidence at trial historically replicated the sequence identified in the pleadings as set out above. The cargo owner may decide simply to tender its bill of lading and call evidence to establish the condition of the cargo on delivery and the cost it incurred in replacing or rectifying the cargo. With the advent of containers, the carrier's acknowledgement of receipt of the goods in 'apparent good order and condition' in the bill of lading may not be as helpful to a cargo owner in circumstances when it can have no idea of the condition of the contents. Claimants are more likely today to have to prove the good order and condition of the goods on delivery to the carrier. If the cargo owner knows how the damage occurred, it might be more prudent so as to avoid splitting its case,[98] to call evidence in chief to explain how it occurred to make good the deficiencies against the carrier it has pleaded in the statement of claim. The carrier will then call its lay and expert evidence to refute the evidence of the cargo owner and support the case it wishes to bring for whatever exceptions it relies upon. Depending on what evidence the plaintiff has chosen to call in chief, it will then seek to refute the allegations made by the defendant's witnesses in reply.

Scrutton LJ in *Madras Electrical Supply Co v P&O Steam Navigation Co*[99] bemoaned the lack of appropriate pleading in that case, when he said:

> But I desire to say this about the pleadings in this case, which startle me … I am quite aware of the difficulty which has always perplexed practitioners in the Commercial Court and will perplex them to the end of all time, whether, when you are suing on a bill of lading and know that exceptions are going to be pleaded and know that you are going to reply unseaworthiness, you should do it in the statement of claim or whether you should wait until the exceptions are pleaded and do it in the reply. I do not propose to decide that interesting question: *but I am clear that you should do it somewhere*, and that when you get before the judge or the Court of Appeal he or they should be able to look at the pleadings and see whether one party alleges unseaworthiness and in what respect he alleges it. (Emphasis added.)[100]

Part 2 will follow in the next issue (25/3) of the Journal of International Maritime Law.

[96] R P Colinvaux, D W Steel and V E Ricks *Forms and Precedents* (Stevens & Sons Ltd 1973) 201.
[97] D W Steel and L Parsons *Admiralty and Commercial Court Forms and Precedents* (Sweet & Maxwell 1993).
[98] P Taylor (ed) *Ritchie's Uniform Civil Procedure NSW* (LexisNexis Butterworths 2005) [29.6.35].
[99] *Madras Electrical Supply Co v P&O Steam Navigation Co* (1924) 18 Ll L R 93.
[100] ibid 96.